

Editor's note: appealed - aff'd, Civ. No. CV-LV-81-504 HEC (D. Nev. June 28, 1983); aff'd, No. 83-2362 (9th Cir. May 22, 1984); 733 F.2d 704

UNITED STATES
v.
THE DREDGE CORP.

IBLA 79-154

Decided April 28, 1981

Appeal from decision by Administrative Law Judge Michael L. Morehouse holding valid the Dredge No. 51 placer mining claim. Nevada 11992.

Reversed.

1. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Discovery: Generally

Where the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of establishing a discovery of a valuable mineral deposit by a preponderance of the evidence.

2. Administrative Procedure: Burden of Proof--Mining Claims: Discovery: Generally--Rules of Practice: Appeals: Burden of Proof

Where a Government mineral examiner testifies that he has examined a mining claim and found the mineral values insufficient to support a finding of a discovery, the Government will have established a prima facie case of the lack of a discovery.

3. Administrative Procedure: Burden of Proof--Mining Claims: Discovery: Marketability--Rules of Practice: Appeals: Burden of Proof

A mining claimant will not have satisfied his burden of proof with respect to marketability where the evidence indicates a superabundance of the mineral of commercial quality such that supply exceeds demand and the claimant fails to show that his mineral deposit possesses a unique advantage over other deposits from potentially competitive sources.

APPEARANCES: James E. Turner, Esq., Office of the Solicitor, Sacramento, California, for appellant; Rex A. Jemison, Esq., Las Vegas, Nevada, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Government has appealed a decision dated December 14, 1978, by Administrative Law Judge Michael L. Morehouse, holding that The Dredge Corporation had satisfied its burden of showing by a preponderance of the evidence that a valuable mineral deposit of a common variety of sand and gravel existed within the boundaries of the Dredge No. 51 placer mining claim situated in the SW 1/4 SW 1/4 sec. 11, T. 21 S., R. 60 E., Mount Diablo meridian, Clark County, Nevada. The claim is on an alluvial fan composed of sand and gravel. It is located approximately 5 miles west of Las Vegas. A patented claim, Dredge No. 60, lies immediately to the south of Dredge No. 51, and the patented claim to the southwest, Wells Cargo, contains an extensive sand and gravel operation which has operated continuously since 1952.

Appellee had filed a patent application for the Dredge No. 51 claim in 1975. A final certificate of entry had been issued to appellee on August 2, 1976, by the Bureau of Land Management (BLM). The Administrative Law Judge ruled that patent should issue, all else being regular.

This case was initiated by a contest complaint issued by BLM, dated October 6, 1977, charging:

1. The land embraced within the claim is non-mineral in character.
2. Valuable minerals have not been found within the limits of the claim so as to constitute a valid discovery within the meaning of the mining laws.
3. No discovery of a valuable mineral has been made within the limits of the claim because the mineral material

present cannot be marketed at a profit now and/or could not be marketed at a profit prior to the Act of July 23, 1955.

A hearing was held before the Administrative Law Judge on April 28, 1978.

The Dredge No. 51 claim was originally located on July 21, 1952, for 160 acres of land described as the SW 1/4 sec. 11, T. 21 S., R. 60 E., Mount Diablo meridian, Clark County, Nevada. In The Dredge Corporation, 64 I.D. 368 (1957) and 65 I.D. 336 (1958), aff'd, Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966), the Department held the claim invalid as to the N 1/2 SW 1/4, SE 1/4 SW 1/4 sec. 11, because that land had been classified for disposition under the Small Tract Act, 43 U.S.C. § 682a (1976), when the claim was located. The SW 1/4 SW 1/4, however, had been open to mineral entry on July 21, 1952, as it had been neither leased nor classified for small tract purposes.

On June 27, 1958, BLM issued a contest complaint charging lack of discovery on the subject land. BLM's motion to dismiss that complaint was granted on December 4, 1958 (Exh. R-12). On September 29, 1966, another contest complaint was issued by BLM charging lack of discovery. After a hearing, the claim was held invalid for lack of a timely discovery of a valuable mineral deposit. This decision was affirmed by the Board in United States v. The Dredge Corporation, 7 IBLA 136 (1972). However, on February 8, 1974, on appeal to the United States District Court for the District of Nevada (Civ. No. LV-2029, RDF), the Department of Justice on behalf of the United States agreed to a stipulation setting aside the Board's decision, without prejudice to the filing of a new contest. The present contest complaint was issued on October 6, 1977.

In his decision the Administrative Law Judge set forth the applicable law, and following a summary of the evidence, he concluded at pages 7-8:

The Board, in upholding the validity determination of an administrative law judge in a similar case, United States v. Lauren W. Gibbs, et al., 13 IBLA 382 (1973), stated:

Numerous sand and gravel claims have been patented in the immediate vicinity of the contested claim. In fact, as previously noted, sand and gravel claims have been patented on lands adjoining the Sorefoot claims to the east, north and south (Exh. MC-1). Moreover, pursuant to the application at issue in this case, the south half of the Sorefoot No. 11 has been approved by the Bureau for patent. The decisions to issue these patents involved, in each separate instance, a determination that the material from these claims could have been marketed at a profit prior to July 23, 1955. Yet we are asked to hold that this material, which

is undistinguishable from the claims adjacent on three sides, could not have been marketed then. On what basis can we so hold?

The quantities and quality of the sand and gravel are similar, access is excellent, and hauling distance is not significantly greater from the patented claims to the east and no greater than from those to the north and south, and no special problems or difficulties in the extraction, removal or processing of the material have been identified which are peculiar to this particular claim. In short, all of the evidence shows that this claim, which the Bureau maintains is invalid, is physically identical in every pertinent aspect to the claims adjacent on three sides which the Bureau has held are valid. (p. 389)

With slight variations all of the elements present in Gibbs, supra, are present here. It is therefore concluded that the material on the claim was marketable at a profit as of the withdrawal date and prior thereto.

The record shows that the material on the claim continued to be marketable at a profit following 1955, as evidenced by removal and sale of approximately 70,000 cubic yards from the claim between 1962 and 1966.

Pursuant to the mining laws of the United States, the locator of a mining claim is entitled to purchase land containing a valuable mineral deposit. 30 U.S.C. § 22 (1976). A "valuable mineral deposit" has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1976), declared that deposits of common varieties of sand and gravel and certain other materials shall not be deemed valuable mineral deposits under the mining laws. In order for a mining claim for a common variety of sand and gravel, located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man-marketability test of discovery must have been met at the time of the Act and reasonably continuously thereafter. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); Palmer v. Dredge Corp., 398 F.2d 791, 795 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); United States v. Martinez, 49 IBLA 360 (1980); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

[1] Where the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of establishing by a preponderance of the evidence a discovery of a valuable mineral deposit. Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The Government essentially rests its case on the testimony of Shinzi Kuniyoshi, a BLM mineral examiner. Kuniyoshi had prepared a mineral report dated August 26, 1977, evaluating the validity of the Dredge No. 51 claim (Exh. G-3). This report was based on on-site examinations of the claim and a review of past documents relating to the claim including a report prepared by W. F. Criswell and Don L. Reed, BLM mineral examiners, dated December 20, 1954 (revised February 9, 1955) (Exh. G-5); a report entitled "Report on Sand and Gravel Marketability in Las Vegas Valley, Nevada" prepared by Starr Hill, Jr., and Earl M. P. Lovejoy, dated November 1956 (Exh. G-4); a memorandum from Edgar A. Hollingsworth, BLM valuation engineer, to "Lands and Minerals Officer," dated June 11, 1958 (Exh. G-6, Appendix B); and a mineral report prepared by Frederick A. Kuhlman, BLM valuation engineer, dated April 20, 1966 (Exh. G-6).

Kuniyoshi noted the absence of mining activity prior to 1958 (Exh. G-3 at 7; Tr. 32-33). Criswell and Reed had observed no improvement "of a mining nature" when they examined the claim in November or December of 1954 (Exh. G-5 at 19). Furthermore, Thomas Schessler, the BLM mineral examiner who testified at the 1969 hearing on the validity of the Dredge No. 51 claim, confirmed the lack of mining based on aerial photographs taken February 28, 1956. United States v. The Dredge Corporation, supra at 141. Kuniyoshi himself examined an aerial photograph dated March 4, 1958, and could discern no evidence of mining (Tr. 32-33). Finally, Hollingsworth found "[n]o improvements" when he examined the claim on May 21, 1958 (Exh. G-6, Appendix B).

While the Dredge No. 51 claim was located relatively near Las Vegas (its "only potential market"), Kuniyoshi felt that the sand and gravel deposit on the claim did not compare favorably with other deposits in the area, principally with respect to the quantity of loose sand and gravel available (Tr. 113-17). However, he indicated that the loose sand and gravel on the Dredge No. 51 claim was "the same" type of material as that on other claims, but not better (Tr. 42). It ranged in thickness from 1/2 to 3 feet and contained undersized and oversized particles "coated with calcium carbonate" (Tr. 38).

In his report, Hollingsworth noted the depth of the surface material at 1 to 1-1/2 feet (Exh. G-6, Appendix B). Similarly, Kuhlman reported the depth at 9 inches to 1 foot and confirmed that the material was coated with calcium carbonate (Exh. G-6 at 2). Kuniyoshi indicated that the calcium carbonate coating might result in weaker concrete material (Tr. 38-39). Furthermore, Kuniyoshi judged the sand and gravel

by Nevada specifications for Type 2 road base aggregate, as this was considered the "least stringent requirement for construction material" (Tr. 39). He stated that appellee's sand and gravel would not meet such specifications without further processing (Tr. 39-40).

While the Dredge No. 51 claim was thought to have "[l]arge amounts" of sand and gravel below the caliche which was "more than five feet thick", its removal was felt by Kuniyoshi to be "not practical in 1955" and not profitable in 1977 "unless it is a large-scale, long-term operation covering more than 40 acres" (Exh. G-3 at 10). In a later examination of the claim, Kuniyoshi noted that the caliche exposed in trenches was up to 20 feet in depth (Tr. 36).

As evidence of the unlikelihood of a market prior to July 23, 1955, for sand and gravel from the Dredge No. 51 claim, Kuniyoshi noted that of the approximately 40,000 acres of land in known sand and gravel mining claims in the area of the Dredge No. 51 claim before July 23, 1955 (5,360 acres of which were subsequently patented), "less than 150 acres were actually occupied by sand and gravel mining in 1955" (Exh. G-3 at 11). He concluded that given the potential source of sand and gravel, if the demand existed, "it is highly unlikely that this claim would have been capable of capturing a portion of the limited market in competition with the vast number of existing better claims which were potentially developable if needed" (Exh. G-3 at 11).

Kuniyoshi also noted a "depression" in the Las Vegas construction industry as indicated by a decrease in the value of building permits in 1955 and a sharp decline thereafter, after a steady increase from 1951-54 (Exh. G-3 at 12). This was confirmed by the Hill and Lovejoy report (Exh. G-4 at 24, 88). Kuniyoshi felt that this decline adversely reflected on the market demand for sand and gravel. Since this slump in the late 50's, increasing production from "existing operators" has kept pace with increasing demand.

Finally, Kuniyoshi pointed out that at the time of the hearing three-fourths of the surface deposit on the Dredge No. 51 had been removed and the current deposit was only 20,000 cubic yards of surface material (Tr. 102-03). Schessler estimated in 1969 that 33,900 cubic yards of surface material had been removed, out of a total of 60,000 cubic yards. United States v. The Dredge Corporation, *supra* at 141. Kuhlman estimated that 55,000 cubic yards of surface material had been removed since 1958 and that "over one-half of the area of this 40 acres had been mined" (Exh. G-6 at 3).

[2] Kuniyoshi concluded, as had Criswell and Reed, Hollingsworth and Kuhlman, that there was no discovery of a valuable mineral deposit on the Dredge No. 51 claim on July 23, 1955, or thereafter. Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support the finding of a discovery, the Government will have established a prima facie case. Foster v. Seaton, *supra*; United States v. Knecht, 39 IBLA 9 (1979). Accordingly, we hold, based on the evidence presented by the Government,

that it established a prima facie case both as to the lack of a discovery of a valuable mineral deposit on July 23, 1955, and thereafter. ^{1/}

We now turn to the question of whether appellee has proven the existence of a discovery by a preponderance of the evidence. The Dredge No. 51 and Wells Cargo claims were both located by Vernon D. Bradley and his associates. A processing plant was set up on the Wells Cargo claim and a haul road constructed in 1953 or 1954 from the Dredge No. 51 claim to the plant (Tr. 182-85). He testified that in 1954, 4,500 cubic yards of surface material were hauled to the plant from the Dredge No. 51 claim (Tr. 187). He stated that "[t]hey were only supposed to take five hundred yards off each claim," but more was taken from the Dredge No. 51 because of its proximity to the plant (Tr. 187; Exh. R-1, "Exhibit 'D'"). Bradley estimated the deposit in 1953-54 at 203,750 cubic yards, going to a depth of 4 feet (Exh. R-1 "Exhibit 'D'" at 2; Tr. 196). The market price at that time for type 2 road base aggregate was 90 cents per ton and the cost of hauling was 4 cents per ton mile (Exh. R-1, "Exhibit 'D'" at 4). In 1975, Bradley estimated the deposit at 152,811 cubic yards (Exh. R-1, "Exhibit 'D'" at 3). Furthermore, Bradley testified that at all the relevant times it would have been possible to mine below the layer of caliche (Tr. 169, 193). The caliche layer was not the very hard silt stone caliche (Exh. R-2A), but rather a cemented gravel which breaks apart more readily (Exhs. R-2B and C; Tr. 55). Regarding the coating of calcium carbonate, Paul Bronken, a mining engineer, testified that it would pose no problem for use of the sand and gravel in concrete. The coating would be removed through normal processing of the material (Tr. 172-73, 180-81).

Bradley also testified that in the early 1950's he, William A. McCall, Sr., and Joe Wells agreed to divide up the unpatented mining claims they had located. He stated: "So we met out at Joe Wells' house one night and he said all right, we'll just drop all the lots in the hat and you pick one, I'll pick one, you pick one and I'll pick one and that's how we split up the land" (Tr. 188-89). He explained further:

Joe pulled out of the hat the present claims of his own, and that's how come he moved his plant to that position. He was very lucky, he pulled the same quartersection his plant was already on. However, looking ahead he decided he may want to move his offices and everything else out there so he moved it back off that corner, which he figured that some day might become valuable for offices and stuff like that and moved it back up into the thing a little bit.

(Tr. 189).

^{1/} In holding that the Government has established a prima facie case we do not rely on the alleged absence of mining activity or sales, which are an admittedly weak basis. See Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972); United States v. Hess, 46 IBLA 1 (1980); United States v. Gibbs, *supra* at 388.

McCall indicated that the material on the Wells Cargo and Dredge No. 51 claims was similar and that was why he was willing to draw lots for the claims (Tr. 222). He stated that in 1954 "Wells Cargo decided and we mutually decided we wanted to develop [sic] thirteen of the Dredge mining claims and number 51 was not among them" (Tr. 226-27; see also Exh. R-1, "Exhibit 'D'"). The 13 claims contained 160 acres each (Tr. 227).

Appellee established that between 1962 and 1966 sand and gravel was being removed and sold from the Dredge No. 51. However, in 1966 appellee received a copy of a letter from the BLM District Manager, Las Vegas, to appellee's contractor, Rock Products, Inc., advising that if the claim was ultimately determined to be invalid, the contractor and the locators or owners of the claim could be liable for trespass damage (Exh. R-13; Tr. 97-98). The letter also erroneously stated that "[u]nfortunately there is no provision for the Bureau of Land Management to allow removal of material from an unpatented mining claim." The letter caused operations on the claim to cease and no further material had been removed from the claim as of the hearing date.

[3] In holding that sand and gravel from the Dredge No. 51 claim was marketable prior to July 23, 1955, the Administrative Law Judge apparently relied on the fact that the material was "substantially similar" to the sand and gravel on adjacent patented claims and on quoted language in the case of United States v. Gibbs, supra. On appeal, the Government disputes the finding of substantial similarity.

For the reasons stated below, further analysis of the Gibbs decision and subsequent Board and court decisions leads to a conclusion contrary to that reached by the Administrative Law Judge.

Taken by itself, the language from Gibbs, quoted by the Administrative Law Judge, seems to indicate that where a deposit of sand and gravel on an unpatented mining claim is similar to deposits on patented claims in the immediate vicinity, in terms of quantity, quality, access, hauling distance, and the details of extraction, removal, and processing, the marketability test is satisfied; there is no longer a need to demonstrate an existing market demand and the potential profitability of the extraction, removal and marketing of the material. One might argue that the requirements of proof are concluded by the fact that the Department has already determined marketability prior to July 23, 1955, by issuing the patents on the nearby mining claims.

We cannot find that proof of substantial similarity between neighboring unpatented and patented sand and gravel mining claims necessarily dispenses with the need for demonstrating an existing market demand as of July 23, 1955; nor do we believe that the law requires that result. It is a mistake of law to assume that a discovery on one claim can inure to the benefit of another claim. United States v. Melluzzo (Supp. on Judicial Remand), 32 IBLA 46, 59 (1977), aff'd, Melluzzo v. Andrus, No. CIV-79-28-PHX-CAM (D. Ariz. May 20, 1980); Henrikson v. Udall, 229 F. Supp. 510, 512 (N.D. Cal. 1964), aff'd, 350 F. 2d 949 (9th Cir. 1965), cert. denied, 384 U.S. 940 (1966).

Where there is a group of mining claims, each claim must be supported by a discovery of a valuable mineral deposit within its own boundaries. United States v. Melluzzo (Supp. on Judicial Remand), *supra*; United States v. Gardner, 14 IBLA 276, 285, 81 I.D. 58, 62 (1974).

The demand for a mineral (assuming no differential in quality, pricing, or availability) depends in part on the extent of supply of the mineral. A market saturated with a supply of the mineral will present no additional demand for that mineral unless there are significant economic advantages to be derived from the quantity, quality, or location of the new deposit.

In United States v. Gibbs, *supra* at 397, we were concerned with the "available" supply of sand and gravel in terms of meeting market demand. We discounted the mere "presence" of sand and gravel, as demonstrated by identified deposits of sand and gravel in the area or the location or patenting of mining claims in the area for sand and gravel.

However, in United States v. Osborne (Supp. on Judicial Remand), 28 IBLA 13, 47 (1976), we noted that the court in Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976), had highlighted the "fallacy" in Gibbs of failing to consider potential sources of supply. In Melluzzo v. Morton, *supra* at 863-64, the court stated:

[T]here is more to proof of marketability than proof that there was a local market for sand and gravel. The claimant must establish that his material was of a quality that would have met the existing demand and that it was marketable at a profit. As to the matter of quality, appellants would appear to have no problem. As to the matter of profitable marketing, questions remain.

* * * * *

Two profit factors can be drawn into question in considering whether a claimant's material, although it had not been marketed at a profit, nevertheless could have been marketed at a profit.

[5] 1. The cost factor. It must appear that the cost of extraction, preparation for market and transportation to market will, in the claimant's case, provide a value increment or profit comparable to that which attaches to the material being successfully marketed by others. * * * [Footnote omitted.]

2. The demand factor. It must appear that the local demand was able to absorb additional material such as the claimant's and still permit an attractive profit to be realized. It is for that profit that the newcomer, under Barrows, must be permitted to compete. In order to ascertain whether a demand existed for hitherto unmarketed material a hypothetical market must be created in which

the new material plays its part. If the profitability of the market for such material is realistically to be ascertained by setting the factor of demand opposite that of supply, the new material must be included with that from all other known potentially competitive sources in calculating the factor of supply. 4/ If supply so calculated amounts to a superabundance and so overwhelms the existing demand as to reduce the value or profit increment to a level below that which would prove attractive to a prudent man, the material cannot be said to be marketable at a profit. 5/

4/ A hypothetical market in which the claimant's material is the only unmarketed material taken into account is hardly a useful supposition. If claimant's material can be marketed, then so can that from all potentially competitive sources. To exclude all unmarketed material save that of the claimant could result in the unrealistic conclusion that all such material, considered claim by claim, is marketable at a profit notwithstanding the fact that if the claims had all been actively operated none could have done so profitably.

5/ If the newcomer fails to establish marketability under this test, it would not be due to preemption of the market by established operators (reliance on which is precluded by Barrows), but because of the total amount of material available and the limited demand for it. [Emphasis added.]

Therefore, it is clear that the proposition of substantial similarity relied on by the Administrative Law Judge must be weighed against the evidence of market demand and sources of supply.

In the present case, the Government presented evidence that sand and gravel mining before July 23, 1955, only occupied 150 out of a total 40,000 acres in known sand and gravel mining claims in the west side of the Las Vegas Valley. Furthermore, as noted in United States v. Osborne, supra at 47-48, there was a "slump" in the market for construction materials such as sand and gravel in the Las Vegas area, as indicated by a sharp decline in the valuation of building permits from 1954 to 1957. This is reflected in evidence presented herein by the Government. In addition, we take notice of the statement in United States v. Gibbs, supra at 397, that there was a "super-abundance of commercial quality sand and gravel in the Las Vegas Valley" prior to July 23, 1955. Also in United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285, 293 (1971), aff'd sub nom. Clear Gravel Enterprises, Inc. v. Keil, No. 1654 (D. Nev. May 4, 1972), aff'd per curiam, 505 F.2d 180 (9th Cir. 1974), cert. denied, 421 U.S. 930 (1975), we stated that "the 1955 market for sand and gravel in the [Las Vegas] Valley was being adequately satisfied by the then existing producers." As we stated in United States v. Osborne, supra at 48:

Given this slump in overall demand and the competitive nature of the market, would a prudent man have begun actual operations in 1955? While a person would not thereby be precluded from beginning operations, it is unlikely that he would choose to do so unless he had some unique advantage over his competitors such as superior quality or lower costs. Nothing in the record indicates that the contestees have such an advantage.

The lack of a "unique advantage" is similarly evident in the present case. 2/ Compare with United States v. Martinez, supra at 373. There is no evidence that appellee could have undercut the already satiated and declining market prior to July 23, 1955. At best, its evidence demonstrates that the sand and gravel on the Dredge No. 51 claim was the same as sand and gravel on the neighboring Dredge No. 60 and Wells Cargo claims, although the quantity of loose material above the caliche layer was less. 3/

Moreover, appellee's testimony indicates that there was a conscious decision made in 1954 not to develop the Dredge No. 51 claim. However, appellee was apparently involved in an arrangement whereby a limited amount of sand and gravel would be removed from a number of different claims. As we stated in United States v. Osborne, supra at 29:

2/ Even if appellee were to argue that the Dredge No. 51 claim maintained a unique advantage because of its proximity to Las Vegas, we note that the record discloses that any pre-1955 removals from the claim were indicated as having been processed at the Wells Cargo plant which meant the material was hauled further from its potential market in order to be processed. Although there was some evidence that sand and gravel was sometimes sold in place, there was also testimony that material from the Dredge No. 51 was principally useful for roadbuilding (Tr. 39, 142); that in the early 1950's the State had a sand and gravel pit that was closer to Las Vegas than the Dredge No. 51 and that it was used by contractors (Tr. 157, 195); that in 1954-55 BLM had set aside 680 acres of sand and gravel for use by the county and city (Tr. 142); and that the county and city bought very little sand and gravel from contractors (Tr. 142).

3/ There was testimony that it was more expensive to mine in or below the caliche layer (Tr. 156-57, 178), and that in mining sand and gravel in 1955 this was not generally done because too much of the loose material above the caliche layer was available without the added expense of going deeper (Tr. 156-57). When the testimony of Kuniyoshi, that the Dredge No. 51 claim contained a relatively lesser amount of loose material than the Wells Cargo or the Dredge No. 60 claims (Tr. 113-17), is coupled with the testimony that the Wells Cargo operation did not exhaust the loose material and penetrate the caliche layer until after 1955 (Tr. 124-25), the lack of any unique advantage for the Dredge No. 51 claim becomes more apparent.

Where, as here, there are thousands of acres of generally homogeneous material in the immediate vicinity of a limited general market, it would theoretically be possible for a group of claimants to have located numerous 160-acre placer claims and to sell a little sand and gravel from each one at a profit. But that would not, of itself, validate all the claims, or any one of them. Such activity would not constitute a bona fide intent to develop a valuable mine, nor would it demonstrate that any particular claim contained a "valuable" mineral deposit on which a sustained, profitable, commercial mining operation could be conducted.

Appellee has failed to prove that the sand and gravel from its Dredge No. 51 claim was marketable at a profit as of July 23, 1955. ^{4/} It would not have been proper under such circumstances for appellee to have held the claim as a reserve source of supply and ridden out the "slump" in market demand, resuming production when the market outlook improved. It is well established that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim. Barrows v. Hickel, *supra*; United States v. Gibbs, *supra* at 396.

Furthermore, appellee has failed to prove by a preponderance of the evidence that its sand and gravel was marketable at a profit after July 23, 1955. The Government presented evidence that the slump in the Las Vegas construction industry continued until 1957. Since that time,

^{4/} Throughout this case we have referred to July 23, 1955, as the cut-off date as of which a discovery must be shown. Actually, the critical date appears to be October 8, 1953, at the earliest, or January 15, 1955, at the latest. See United States v. Gibbs, *supra* at 385 n.3; United States v. Clear Gravel Enterprises, *supra* at 298 n.6 (1971). On October 2, 1953, there was issued Classification Order No. 95, published on October 8, 1953, 18 FR 6412, which classified the land in appellee's claim for small tract disposal. In Osborne v. Hammit, 377 F. Supp. 977 (D. Nev. 1964), the court held that order No. 95 was in effect a withdrawal of land which invalidated ab initio any mining claim located on the land after the classification order. On January 15, 1955, a regulation was published which provided that a classification under the Small Tract Act would segregate the land classified from all appropriations, including locations under the mining laws (43 CFR 257.3(b), 20 FR 366; now 43 CFR 2731.2(b)). Under the Osborne ruling appellee would have to show that the material from its claim was marketable at a profit as of October 8, 1953. At the latest the showing would have to be made as of January 15, 1955, the date of publication of the regulation spelling out the effect of a small tract classification. On April 16, 1959, Classification Order No. 95 was revoked insofar as it applied to the Dredge No. 51 claim (Exh. R-16). Nevertheless, it operated as a withdrawal during the time it was in effect. We do not, however, rest our decision on appellee's failure to make the required showing as of either October 8, 1953, or January 15, 1955, since it is clear that it failed to make the showing even as of July 23, 1955.

increasing demand for sand and gravel has been met by increasing production from existing operators.

The best evidence presented by appellee is that it broke into the market with a few sales (totaling 12,000 cubic yards) between 1955 and 1959 and picked up somewhat with sporadic sales (totaling 70,000 cubic yards) between 1962 and 1966, when the BLM letter indicating potential liability for trespass allegedly halted production (Exh. R-15). In Melluzzo v. Morton, *supra* at 863, the Court stated that "insubstantiality of sales" is relevant but not conclusive proof of the lack of value, which can be "overcome by evidence of marketability." Appellee has presented no evidence as to marketability subsequent to 1966. Evidence of past sporadic sales will not suffice to define the present market. United States v. Slater, 34 IBLA 31 (1978).

Appellee argues that the Government's contention that the Dredge No. 51 claim is too small to support a large scale mining operation was overcome at the hearing by the Government mineral examiner's concession that if in 1966 the Dredge No. 51 claim had been combined with 40 acres of the patented Dredge No. 60 claim, appellee would have had a successful large scale operation (Tr. 96). This, however, does not establish the existence of a discovery within the limits of the Dredge No. 51 claim. While claims certainly may be combined for operational purposes, there must be a discovery of a valuable mineral deposit within the boundaries of each claim in a group of claims. United States v. Melluzzo (Supp. on Judicial Remand), *supra*.

Even assuming a continued "substantial similarity" between the Dredge No. 51 claim and the Dredge No. 60 and Wells Cargo claims, the Government has presented evidence that the market remained saturated throughout this time period. Appellee has failed to prove that sand and gravel from the Dredge No. 51 could have been extracted, removed and marketed at a profit subsequent to July 23, 1955. 5/

5/ In holding that appellee has not proven marketability subsequent to July 23, 1955 we do not rely on the Clark County zoning ordinance introduced into evidence by appellant, which would apparently prohibit mining (Exh. G-10). We need not speculate on what the county planning department may or may not do in terms of enforcing the ordinance or granting a use variance. The ordinance has no bearing on the question of whether a valuable mineral deposit has been discovered, which would entitle appellee to a patent under 30 U.S.C. § 22 (1976). The question of a discovery takes into consideration circumstances at certain critical dates prior to patent. Otherwise, the validity of mining claims and the patenting of Federal land would depend on mere speculation as to future circumstances. Prior to patent, a local zoning ordinance would be pre-empted to the extent to which it conflicted with the Federal mining laws. Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979). Under those laws, mining of a properly located mining claim on Federal land has always been permitted. See, e.g., United States v. Etcheverry, 230 F.2d 193 (10th Cir. 1956). Moreover, this itself is a vital way, in many cases, to demonstrate the existence of a valuable mineral deposit.

For the reasons outlined above, we hold that appellee has failed to prove by a preponderance of the evidence the existence of a discovery of a valuable mineral deposit on its Dredge No. 51 claim as of July 23, 1955, or reasonably continuously thereafter. Appellee's patent application is rejected, and the claim is declared null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the decision appealed from is reversed.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Acting Administrative Judge

